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No. 90-461

In The

Supreme Court of the United States

OCTOBER TERM, 1990

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

LANI MOORE, *et al.*,
Respondents.

Reply to Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

For the reasons set forth below, the Opposition fails to demonstrate that review by this Court is unwarranted. On the contrary, it provides powerful evidence that the well-reasoned opinion of Judge Friedman faithfully applies the principles of statutory construction that have been established by this Court.

I. THE STATUTORY LANGUAGE.

In defending the *en banc* opinion's analysis of the statutory language, respondents have abandoned two of their successful arguments below: (1) the terms "action or proceeding" in the basic fee-shifting provision (1415(e)(4)(B)) must be read in isolation; and (2) Congress mistakenly used the term "subsection" when it specified that fees may be awarded in "any action or proceeding brought under this subsection." See Pet. App. at 6a, 12a-14a. Respondents thus have implicitly conceded that important aspects of the *en banc* opinion are seriously flawed and contradict *Crest Street*. *See North*

North Carolina Department of Transp. v. Crest Street Community Council, Inc., 479 U.S. 6, 15 (1986); *id.* at 20-21 (Brennan, J., dissenting). As we have shown, the language of the EHA, as amended by the HCPA, authorizes civil actions only by parties aggrieved by an administrative decision (§ 1415 (e)(2)); it does not authorize civil actions for any purpose, including fees, at the behest of parents who prevail in administrative proceedings brought under subsections (b) and (c) of the EHA. Pet. at 13-18; See Pet. App. at 29a-39a.

II. THE LEGISLATIVE HISTORY.

As the Opposition underscores, the *en banc* court's analysis of the legislative history of the HCPA rests in substantial measure on isolated fragments of that history and on inferences from that history that this Court ruled improper in *Crest Street*. Insofar as the Senate is concerned, the Opposition urges: (1) the Senate Report's reference to *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54 (1980), must be read as endorsing the *dictum* of that case, as well as its holding; and (2) the expansive view of the scope of the Senate bill expresed by Senator Simon, in his first year in the Senate in 1985, must be accorded controlling weight. This is so even though every other Senator who spoke in 1985 and every Senator, including Senator Simon, who spoke in 1986 described the bill as authorizing fees for parents who must go to court to enforce their child's right to an education and for parents who prevail in a civil action brought for that purpose. Both arguments flatly contradict *Crest Street* (479 U.S. at 12-13); and both defy common sense.

Insofar as the House is concerned, the Opposition, like the *en banc* opinion, places controlling weight on views expressed in 1985 and on views expressed by only two House members (Representatives Bartlett and Jeffords) in 1986 after the conference. The Opposition urges that the views expressed by two members in 1986 must mean that it was "universally understood" that the HCPA authorized an action for fees alone. Opp. at 11.

However, there was no such universal understanding of the legislation either in the Senate, as already discussed, or in the House. For example, several House members, who were also members of its Rules Committee, described the legislation on the very day it was enacted in the House as follows:[1]

> [Mr. Beilenson:] S. 415 would overturn . . . Smith v. Robinson. That decision . . . rendered courts unable to award attorneys' fees to families who sue school districts which fail to provide appropriate educational opportunities for handicapped children. Up until the Supreme Court's ruling, parents . . . who successfully sued under the Education for the Handicapped Act could be awarded attorneys' fees under other civil rights statutes . . . . The Supreme Court ruled, however, that attorneys' fees may no longer be awarded in cases brought under the Education for the Handicapped Act, since the act did not so specifically provide.
>
> The conference report . . . would restore the ability to recover attorneys' fees . . . .
>
> [Mr. Quillen:] The conference report . . . merely overturns the decision of the Supreme Court . . . to authorize the award of reasonable attorney fees to prevailing parties who file suit under the act.
>
> [Mr. Walker:] . . . [I]t would be my understanding that we are simpy allowing parents of handicapped children . . . access to court to ensure the[m] that if they bring a legitimate case that reasonable attorneys' fees can be awarded . . . .

132 Cong. Rec. H4833-34 (July 24, 1986). Floor manager Williams, moreover, specified after the conference that the HCPA was to be interpreted like 42 U.S.C. § 1988 and that

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[1] For reasons not related to the question before the Court, a special resolution initiated by the House Rules Committee was needed to permit consideration of the conference bill. The remarks quoted in the text were made in support of that measure, House Resolution 505, which was passed by a voice vote just before the HCPA was approved.

it provided fees only in circumstances permitted by other fee-shifting statutes. See Pet. at 23.

As a consequence, it cannot be said that there was a universal understanding that independent fee actions were authorized. On the contrary, it appears that Representatives Bartlett and Jeffords did not understand what had transpired at the conference,[2] unless, of course, floor manager Williams misunderstood not only what had happened at the conference but also what Congress had done when it enacted §1988. Furthermore, the position that the views expressed by two House members in 1986 reflect *Congress'* intent requires the conclusion that the senior Senators who addressed the bill that became the HCPA did not understand what they had enacted on prior occasions and carelessly misled their colleagues about the scope of the bill.[3]

III. THE IMPORTANCE OF THE QUESTION PRESENTED FOR REVIEW.

The Opposition suggests that this case is unimportant because the amount of money involved is not great. The importance of this case does not, however, depend solely on the extent to which independent fee actions financially disable schools from accomplishing their important educational mission. On the contrary, review is necessary for several other reasons. First, given the erroneous interpretation of *Crest Street* in the HCPA fee cases, this Court must once again provide

[2] Representatives Bartlett and Jeffords did not sign the conference report. Futhermore, according to a 400-page doctoral dissertation submitted by respondents in the court of appeals, "[t]here was no meeting of House and Senate conferees during conference. Rather the compromise was negotiated by staff." West, The Handicapped Children's Protection Act of 1986: A Case Study of Policy Formation at 257.

[3] In view of the consistent interpretation of the legislation in the Senate (excepting, of course, Senator Simon in 1985), Judge Friedman correctly ruled that the elimination of the "sunset" provision at the conference may simply have reflected the Senate's position that there was no need to terminate authority that had not been granted. See Pet. App. 56a.

guidance to the lower courts on the construction of legislation. Second, review is necessary to avoid further confusion in Congress over the law governing fee-shifting statutes. Third, this Court should grant review to effect what Congress enacted and intended: a fee provision that affords handicapped children the same right to fees given other civil rights litigants.[4] Fourth, the recent recognition of an independent fee action has undermined the informal, cooperative mechanism that Congress established in the EHA for ensuring that handicapped children receive a free appropriate public education. See Brief *Amici Curiae* of National School Boards Association, *et al.* Finally, opinions like that for which review is sought here will increasingly result in diverting scarce educational dollars to litigation expenses, not only for fee awards but also for counsel now needed by school districts at the administrative level.[5]

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[4] The Opposition states (Opp. at 14) that we have wrongly suggested that *Crest Street* established this Court's intention to impose uniformity on fee-shifting statutes. This is not so. In *Crest Street*, this Court merely recognized — unanimously — that Congress modeled § 1988 on the fee-shifting provision of Title VII. *Crest Street*, *supra*, 479 U.S. at 15; *id.* at 20-21 (Brennan, J., dissenting). The fact that *Crest Street* considered only two fee-shifting statutes does not, however, mean that Congress does not strive for uniformity. In the case of the HCPA, the legislative history plainly indicates that both Houses of Congress intended fee parity with other beneficiaries of fee-shifting statutes (although apparently some House members, particularly in 1985, could not distinguish between *Carey's* holding and its *dictum*). For example, Senator Weicker, in introducing his initial bill to overturn *Smith v. Robinson*, stated that the bill "carefully follows the language" of the Civil Rights Attorneys' Fees Awards Act of 1976, now codified at 42 U.S.C. § 1988. 130 Cong. Rec. S9078-79 (July 24, 1984).

[5] In this respect, it should be noted that the first appellate court decision authorizing an independent fee action was decided on August 28, 1988. See *Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988). Accordingly, the GAO Report on *fiscal* 1988 fee awards cited in the Opposition (Opp. at 16) cannot reflect the financial impact of the appellate court decisions recognizing independent fee actions.

IV. MISCELLANEOUS ARGUMENTS.

The Views of the Department of Education. The views of the DOE set forth in the Opposition do not establish that Congress enacted, or intended to enact, an independent fee action. Thus, the letter from Secretary Bennett to Representative Bartlett, described in the Opposition (Opp. at 15) was a response to a September 5, 1985, letter from Representative Bartlett in which he interpreted the "action or proceeding" language in the Senate bill as authorizing an independent fee action. By contrast, in an earlier letter to Senator Weicker, dated July 30, 1985, Secretary Bennett expressed no opposition to his Senate bill on the grounds that it authorized independent fee actions, perhaps because the unusual interpretation placed on the language in that bill by some House members had not yet been brought to his attention. Resp. C.A. Br. Add. A-11—A-12.

Following enactment of the HCPA, the DOE has not adopted the position that the HCPA permits an action for fees alone. The DOE's views, initially set forth in a November 12, 1986, response to a letter, are simply that the 1985 House Report would be "relevant" if courts should examine the legislative history in determining whether an independent fee action is permitted. Resp. C.A. Br. Add. A-19. On March 13, 1987, the DOE repeated this statement, but added that the issue was being litigated and that it expected that the dispute "will be clarified in the courts." Resp. C.A. Br. Add. A-21. On June 17, 1988, the DOE merely took the position that court cases had recognized an independent fee action; and on April 14, 1989, the DOE wrote that schools should inform parents of the availability of attorneys' fees but took no position on the issue before this Court. Resp. C.A. Br. Add. A-22—A-24. As a consequence, the DOE has simply not endorsed the position that the HCPA creates an independent cause of action.

The GAO Study. The GAO study authorized by Congress does not establish that an independent fee action is autho-

rized. Instead, given that a parent who must go to court to secure his child's educational rights and who prevails in that forum may recover fees not only for the court action but also for the due process hearing precipitating that action, the study makes sense even if there is no separate fee action. See Pet. at 13 n.4.

CONCLUSION

This Court should grant the petition for a writ of certiorari.[6]

Respectfully submitted,

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[6] Review should not be denied here because of this Court's actions in *Muscogee County School District v. Mitten*, No. 89-905, *cert. denied*, 110 S. Ct. 1117 (1990), and in *Venus Independent School District v. Shelly C.*, No. 89-788, *cert. denied*, 110 S. Ct. 729 (1990). The petition in *Mitten* presented four questions for review, including three that did not need resolution by this Court. The petition in *Shelly C.*, in turn, did not raise the issue presented here because it stated that petitioner had "no disagreement with" a rule "that attorneys fees are available for parties who prevail at an administrative proceeding." 1990 Educ. Hand. L. Rep., Supp. 258 at XIV-45 (Feb. 9, 1990).